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Housing Law BULLETIN

BULLETIN No8

Setting Aside Possession Orders: what constitutes a good reason for non-attendance?

Every practitioner with even modest experience of landlord and tenant law will have been to a possession hearing at which the defendant fails to attend. This will often result in a possession order being made.

Nevertheless, the errant defendant is provided with a possible remedy under CPR r.3.1 (2)(m), which provides that the court may:

'Take any other step or make any other order for the purpose of managing the case and furthering the overriding objective'.

However, it is not an area in which the court will readily extend its characteristic latitude to defendants in possession proceedings.

This bulletin shall examine the meaning of the second requirement for a 'good reason' for non-attendance under CPR r. 39.3(5) (b) in applications to set aside possession orders.

Succeeding in setting aside a possession order following non-attendance is no easy task. Pursuant to CPR r. 39.3(5), a party must demonstrate that:

1. The application to set aside was made promptly;
2. There was a good reason for failing to attend;
3. The applicant has a reasonable prospect of success at trial.

It was held in *Regency Rolls Ltd v Carnall* [2000] EWCA Civ 379 that all three requirements must be satisfied before the court will consider exercising its discretion. If all three requirements are met, it would be very unusual if the applicant did not succeed in having the order set aside.

The majority of the cases cited in this bulletin concern possession proceedings. However, it is submitted that those that do not are of equal application to such hearings.

The Source of the Court's Power to set aside Possession Orders

It was held in *Forcelux Ltd v Binnie* [2009] EWCA Civ 854 that the power furnished by CPR r. 39.3 to set aside orders made at trial will infrequently be of any application to possession orders because hearings at which possession orders are made can only rarely be described as a trials under the meaning of Rule 39.3.

However, in Forcelux, it was held that the court has power pursuant to CPR r.3.1 (2)(m), set out above.

The Test to be applied

This does not mean that the criteria set out in CPR r.39(5) are no longer relevant. It was decided in *Hackney LBC v Findlay [2011]* EWCA Civ 8 that when the court is asked to exercise its discretion pursuant to CPR r.3.1 (2)(m), it 'should in general apply the requirements of CPR 39.3(5) by analogy' and further, that the 'court should give precedence to the provisions of CPR 39.3(5) above those enumerated in CPR 3.9'.

The *Denton* principles will therefore be frequently engaged (*Home Group Ltd v Marie Matrejek* [2015] EWHC 441 (QB)).

What should the Court take into Account?

- In *Bank of Scotland v Pereira* [2011] EWCA Civ 241 it was held that each case must turn on its own facts and that although the three stage test is inherently exacting, the court should not approach the applicant's conduct with undue rigour.
- The court must look at all the circumstances of the case (*Hackney LBC v Findlay* [2011] EWCA Civ 8).
- Whether a party has the benefit of legal representation is likely to be highly relevant.
- In the case of secure tenancies where possession is sought for arrears of rent, the court should scrutinise the Rent Arrears Pre-Action Protocol as a social landlord's failure to comply may constitute good reason for a failure to attend (*Hackney LBC v Findlay*) in itself.

What Constitutes 'Good Reason'?

- A prescriptive approach is not appropriate and the words 'good reason' must bear their ordinary linguistic meaning (*Brazil v Brazil* [2002] EWCA Civ 1135).

The following examples provide a flavour of the court's approach:

- Being unaware of the proceedings will constitute good reason. However, a failure to attend due to ignorance of a hearing in proceedings of which a party is aware is less likely to amount to good cause. (*Estate Acquisition and Development Ltd v Wiltshire* [2006] EWCA 533).
- Non-attendance caused by illiteracy, even where there has been proper service, may constitute good reason (*Brazil v Brazil*, cited above).
- A litigant in person who comes to the understandable, yet erroneous, conclusion that he need not attend the hearing constituted good reason (*James v Chircop* [2014] EWHC 4670 (QB)).
- Being unfit for work will not suffice. A party must be physically unable to travel to the hearing (*Emojevbe v Secretary of State for Transport* [2015 EWHC 1523 (QB)). There is however no requirement to produce medical evidence per se (*St Ermin's Property Co Ltd v Draper* [2004] EWHC 697 (Ch)).
- Stress caused by the proceedings, even when supported by medical evidence, will rarely amount to good reason (*Smith v TBO Investments Ltd* [2014] EWHC 3241 (QB)).

The situations in which the court will find that there was good reason are incapable of exhaustive enumeration. The only indispensable requirement is that the reason for non-attendance must be honest.

Finally, it should be noted that if a defendant fails in their application to set aside the possession order, he or she is not prevented from seeking to appeal the order under the usual procedure in CPR 52.

This practice note was produced by Will Beetson, who is currently undertaking pupillage at 42 Bedford Row.